DEC 28 1926
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 799

S. M. GORIEB, PETITIONER,

vs.

CHARLES D. FOX ET AL., MEMBERS OF THE CITY COUNCIL OF ROANOKE, VIRGINIA.

PETITION FOR WRIT OF CERTIORARI.

W. V. BIRCHFIELD, JR.,
G. A. WINGFIELD,
Counsel for Petitioner.

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IN THE

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S. M. GORIEB

vs.

CHARLES D. FOX ET ALS., MEMBERS OF CITY COUNCIL OF ROANOKE, VIRGINIA, ET ALS.

The Petition of S. M. Gorieb for Review on Writ of Certiorari of a Decision of the Supreme Court of Appeals of Virginia, a State Court of Last Resort.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, S. M. Gorieb, respectfully represents that on the 29th day of September, 1926, a final judgment was entered by the Supreme Court of Appeals of Virginia (R., 53), affirming a judgment entered by the Circuit Court of Roanoke City, Virginia, on the 2d day of March, 1925 (R., 25), denying a writ of mandamus wherein petitioner was plaintiff and the City of Roanoke, Virginia; Charles D. Fox, W. M. Shickel, B. J. Fishburne, J. B. Comer, Luther G. Stiff, mem-

Roanoke, Virginia, to deprive the petitioner of the use of his property without compensation, which your petitioner contends is "a taking" of private property by the City of Roanoke, Virginia, without providing any compensation therefor, and is in violation of both the Federal and State Constitutions.

The court erred in holding that the City Council had the right to grant or withhold a building permit to like persons under like circumstances and conditions. Two of the Honorable Judges of the Supreme Court of Virginia refused to concur in that part of the ordinance which confers upon the City Council of the City of Roanoke, Virginia, the power to grant, in their discretion, special permission to individuals to build on a line other than the existing house line, but concurred in denying the writ of mandamus (R., 63). It is submitted that under the former decisions of this Court police regulations are invalid where they do not apply to all persons under like circumstances and conditions. This was assignment of error No. 1 in the court below (R., 4).

The court erred in construing the ordinance to prohibit the building by the petitioner closer to the street than 34½ feet. This assignment of error was made in the trial below (R., 4).

Section 244 of the ordinance establishes the building line as a line upon which 60 per cent of the houses in the block already erected have the relation to the street (R., 13). There is no uniformity in the front line of the existing houses, and the act not specifying whether to take 60 per cent of the houses nearer to the street or 60 per cent of the furthest

houses from the street, the court took the general average and was not guided by the 60 per cent provision of the ordinance (R., 19).

Reasons Relied on for the Allowance of the Writ.

(*a*) The State court has decided a constitutional question in direct opposition to the holdings of this Court. Beginning in 1886 with the case of Yick Wo *vs.* Hopkins, 118 U. S., 356, this Court held an ordinance prohibiting a laundry except in buildings of brick and stone, without the consent of the board of supervisors, unconstitutional, as a naked and arbitrary power, for not applying to all persons in like circumstances and conditions. In the case under consideration the Virginia Supreme Court holds unobjectionable Section 243 of the City Ordinance,

> "That all buildings hereafter to be erected in the City of Roanoke must be built to correspond to the existing house line of the houses built in the same block unless special permission, otherwise granted by the City Council (R., 13)."

In upholding the validity of the above ordinance, the Virginia court has undertaken to overrule the doctrine established in the case of Yick Wo *vs.* Hopkins.

(*b*) The court has decided that the city can deprive the owner of the use of his property for business purposes where the record shows no necessity for a police regulation of this character, no benefit to the public and no convenience or general welfare to the general public by the regulation. This is in violation of both the Federal and State Constitutions and constitutes "a taking" of private property without compensation.

(c) Under Section 244 of the City Ordinance (R., 13), the building line established must be fixed by the average line established by 60 per cent of the buildings in the block. No buildings in the block being a uniform distance from the street, the court disregarded the 60 per cent provision and took a general average, which is in direct conflict with the holding of this Court in the case of Eubank vs. City of Richmond, 226 U. S., 137, quoting from the opinion of Mr. Justice McKenna:

> "It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed."

If the 60 per cent provision of the ordinance is used, the building line must be determined by either 60 per cent of the nearest houses to the street, 60 per cent of the furthest houses from the street, 60 per cent of the houses at random, or 60 per cent of the nearest and the furthest houses from the street; each calculation gives a different result, and the public convenience, health and safety could not be promoted by a line which may be so variously disposed.

Authorities Cited.

Police regulations, in order to be enforceable, must permit to all persons under like circumstances the enjoyment of the same rights and privileges.

Missouri v. Lewis, 101 U. S., 22;

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S., 26; 9 Sup. Ct. Rep., 207;

Barbier *v.* Connolly, 113 U. S., 30; 5 Sup. Ct. Rep., 357;

Mallinckrodt Chemical Works *v.* Missouri, 238 U. S., 41-55; 35 Sup. Ct. Rep., 671;

State *v.* Pennoyer, 5 L. R. A., 711, and cases;

Ann. Cas. 1915B, 957;

Yick Wo *v.* Hopkins, 118 U. S., 356;

Village of South Orange *v.* Heller, 1921 N. J., 113 Atl., 697.

A statute or ordinance purports to serve the public good, public health and safety, but which in effect does not so serve, but constitutes the taking of private property for public use without providing compensation therefor, is unconstitutional.

John R. Spann *v.* City of Dallas, Texas, 19 A. L. R., page 1387; and recent cases annotated, page 1395; 4 R. C. L., 397;

St. Louis *v.* Hill, 21 L. R. A., page 226;

Val Fruth *et als. v.* Board of Affairs, 84 S. E., 105; L. R. A., 1915C, page 981;

Eubank *v.* City of Richmond (U. S.), 42 L. R. A., 1123;

Robert Wilson *v.* Demmie P. Cooke, Colorado, 1913, 44 L. R. A. (N. S.), page 1031;

Levy *et als. v.* Mrovlog, Supreme Court N. J., 1921, 115 Atl., 350 (footnote 42 L. R. A. (N. S.), 1125);

State of Ill. *v.* City of Chicago, 49 L. R. A. (N. S.), 441 (see annotation);

Chas. H. Buchanan *v.* William Worley, 38 U. S. Supreme Court Reports, 16 (see annotation).

The petitioner avers that in the aforesaid judgment (R., 53) certain errors were committed to the prejudice of the petitioner; the guarantee granted in Article 14, Section 1, of the Constitution of the United States was violated in that the petitioner is deprived of his property without process of law and is denied equal protection under the law.

The said judgment and proceedings show a violation of the guarantee and the Constitution of Virginia, Section 11, that no persons shall be deprived of his property without due process of law.

Whereof your petitioner prays that a writ of certiorari from the Supreme Court of the United States may issue in this case to the Supreme Court of Appeals of Virginia, for the correction of the errors complained of and shown upon the face of the record herewith presented, that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the clerk of the Supreme Court of Virginia, may be sent to the Supreme Court of the United States as provided by law.

Dated at Roanoke, Virginia, the 17th day of December, 1926.

S. M. GORER,
By W. V. BIBBIFIELD, Jr.,
G. A. WINGFIELD,
His Attorneys.